

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**MARIA PINA LLUBERES, *Applicant***

**vs.**

**ASSISTED HOME RECOVERY, INC.;  
BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants***

**Adjudication Number: ADJ16518560  
Oxnard District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and Opinion on Decision, both of which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**ANNE SCHMITZ, DEPUTY COMMISSIONER**  
**CONCURRING NOT SIGNING**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**June 24, 2024**

**SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW  
AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS  
RECORD.**

**MARIA PINA LLUBERES, IN PRO PER  
ERNEST A. BUONGIORNO, APLC, FORMER AA (COST PETITIONER)  
JOHNSON SANDHU, FORMER AA  
NIELSEN PETERSON, FORMER AA  
TOBIN LUCKS, LLP, DEFENSE COUNSEL**

**JMR/mc**

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *MC*

**REPORT AND RECOMMENDATION**  
**ON PETITION FOR RECONSIDERATION**

I. INTRODUCTION

Maria Pina Lluberes, born XX-XX-XXX while employed on July 29, 2022, as a caregiver, in Occupational Group No. 340, at Ventura, California, by Assisted Home Recovery, sustained injury arising out of and occurring in the course of employment to her right shoulder. Petitioner, applicant *in pro per*, seeks reconsideration of the 04/08/2024 Findings and Order that her average weekly earnings were \$698.92.

II. CONTENTIONS

Petitioner, applicant *in pro per* contends that her average weekly earnings should be calculated as \$1,050.00, the weekly rate she was being paid on the day of her injury.

III. FACTS

After reconsideration and on remand the parties presented testimony in addition to the previously admitted documentary evidence.

Joint Exhibit A, the 08/12/2022 record of earnings from the employer has been admitted in evidence on the dispute over the proper average weekly wage that should be used for calculation of disability indemnity. No party contested the accuracy of the numbers set forth in Exhibit A.

Trial testimony did in fact reveal nuances in the earnings history leading to a finding of a slightly higher determination of the AWW. As set forth in the Opinion on Decision of 04/08/2024:

Applicant testified that she would receive assignments that were “ongoing,” meaning that she would care for a long-term patient, working five days per week. Multiple caregivers could be on those cases (*Summary of Evidence*, 02/23/2024, page 2 - 3). Ongoing assignments were always 12 hour shifts per week.

Assignments that were not for “ongoing” long-term patients resulted in fewer hours. Ms. Gandel further explained the “ongoing” assignments (*Summary of Evidence*, page 5). “An ongoing case is where a client requests care for a month or some other time. Though the request may be for a month or some other time, the clients hire the company only from week to week because there may be changes in circumstances...”

Gandel further testified that the company makes no promises to employees of ongoing assignments.

Applicant testified that she contracted COVID in January of 2022, and that she received no ongoing assignments until the one assigned on 07/16/2022 (Applicant's Exhibit 1).

Both testified consistent with Applicant's Exhibit 1 that applicant was given an ongoing assignment as of 07/16/2022, that continued until her industrial injury of 07/29/2022, and that there was no request to change or stop that assignment before the injury.

In re-calculating the AWW, the undersigned found that neither the periods where applicant was receiving no "ongoings" at all nor the periods where applicant worked only "ongoings" fairly represented the average weekly wage for indemnity purposes. Consistent with that, the undersigned excluded periods where COVID prevented the more lucrative ongoing assignments.

Petitioner applicant seeks reconsideration.

The periods where applicant received both ongoing and non-ongoing assignments resulted in an average of \$698.92.

#### IV. DISCUSSION

In short applicant contends that since she was injured during an ongoing assignment, her average weekly wage is to be the rate she would receive during exclusively ongoing assignments, and that none of the wages during periods where she would receive both ongoing and non-ongoing assignments should be considered.

This would not represent the average weekly wage. Over the history of employment represented by Joint Exhibit A, the out of the ordinary periods (COVID limitation) were excluded from consideration, and the period of the ordinary course of business, when both ongoing and non-ongoing assignments were assigned was used to reach the \$698.92 calculation.

V. RECOMMENDATION

Based on the foregoing the undersigned WCALJ recommends that the petition for reconsideration be denied.

DATED AT OXNARD, CALIFORNIA

DATE: 05/01/2024

**WILLIAM M. CARERO**  
WORKERS' COMPENSATION JUDGE

## OPINION ON DECISION

Applicant herein seeks a determination of her average weekly wage. The issue returned to the trial level after remand on reconsideration of the 10/17/2023 finding of \$694.07 as an average weekly wage for indemnity purposes based on Joint Exhibit A submitted by the parties.

At the time of injury applicant worked as a caregiver.

Here rate of pay was \$15.00 per hour, though there were overtime rates and double time rates (\$17.00 per hour and \$22.50 per hour, respectively). Payments for those rates are included in the parties' Joint Exhibit A.

On remand the Board determined that the record was insufficient to support the decision. Further trial proceedings were held on 02/23/2024 at which time applicant testified as did Maria Gandel, the director of HR for the employer.

Applicant testified that she would receive assignments that were "ongoing," meaning that she would care for a long-term patient, working five days per week. Multiple caregivers could be on those cases (Summary of Evidence, 02/23/2024, page 2 - 3). Ongoing assignments were always 12 hour shifts.

Assignments that were not for "ongoing" long-term patients resulted in fewer hours per week.

Ms. Gandel further explained the "ongoing" assignments (Summary of Evidence, page 5). "An ongoing case is where a client requests care for a month or some other time. Though the request may be for a month or some other time, the clients hire the company only from week to week because there may be changes in circumstances..."

Gandel further testified that the company makes no promises to employees of ongoing assignments.

Applicant testified that she contracted COVID in January of 2022, and that she received no ongoing assignments until the one assigned on 07/16/2022 (Applicant's Exhibit 1).

Both testified consistent with Applicant's Exhibit 1 that applicant was given an ongoing assignment as of 07/16/2022, that continued until her industrial injury of 07/29/2022, and that there was no request to change or stop that assignment before the injury.

The earnings for the week of the accident were \$1,043.25.

Applicant contends that her average weekly wage should be \$1,050.00, which is what she would earn during weeks of ongoing assignments. Defendant makes the simple calculation of one year of earnings prior to the injury divided by weeks worked, resulting in \$694.07 as the AWW.

Based on the testimony of both applicant and Ms. Gandel the employment arrangement did not involve only ongoing assignments.

In the period before applicant contracted COVID (07/26/2021 through 01/09/2022) applicant's earnings totaled \$16,075.07 over 23 weeks. This produces an average of \$698.92 per week. During this period applicant worked both ongoing and non-ongoing assignments.

During the period after contracting COVID, until the final July ongoing assignment, applicant earned \$14,532.01 over 24 weeks for an average of only \$605.50.

During the short period between the 07/16/22 ongoing assignment and the 07/29/2022 injury the earnings were \$2,214.88 over 4 weeks for an average of \$533.72.

Based on the overall record, including the history of assignments, it is found that the period when no ongoing assignments were given does not fairly represent an average weekly wage for indemnity purposes.

Singling out only weeks of ongoing assignments and excluding weeks of non-ongoing assignments similarly does not fairly represent the AWW.

The most reasonable and fair calculation must exclude the period where applicant received no ongoing assignments at all. Thus, based on Labor Code Section 4453 (c)(4), which provides for deviation from subsection (c) (1), (2) and (3), it is found that the earnings from 07/26/2021 through 01/09/2022 must be used for the proper calculation. The hourly rates for regular time, overtime and double time are the same as on the date of injury.

The mix of ongoing and non-ongoing assignments is considered at the same pay rates and without considering the period when COVID prevented the assignment of the more lucrative ongoing assignments.

Accordingly it is found that applicant's average weekly wage for indemnity purposes is \$698.92.

DATED AT OXNARD, CALIFORNIA

DATE: 04/08/2024

**WILLIAM M. CARERO**  
WORKERS' COMPENSATION JUDGE